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ABSTRACT

This paper-part of a collection of 54 papers from the 48th annual conference of the Education Law Association held in November 2002-address juvenile justice. Its central issue is how to protect children of color in elementary and secondary schools with constitutional due process where attendance is compulsory and, at the same time, maintain a safe school environment. The paper presents changes in juvenile justice-citing a number of federal and state crime bills and court cases-and the impact of those changes. The paper argues that the changes in juvenile justice result in a form of social control of nonhegemonic groups (minorities) by a dominant hegemonic group (white European ethnic groups), and that crime-control laws enacted in the last 2 decades have had a negative impact on children of color engaged in delinquent behavior. The paper concludes with several recommendations, the chief of which is that schools should teach information about the Constitution through the justice system. Young people, including children of color, will obey the laws if they have a better understanding of the laws and their relationship to the Constitution, the courts, and the political process. (Contains 43 references, many of which are court cases.) (WFA)

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Frank Brown

November 2002

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The Substantive and Procedural Due Process Rights of Students Accused of Criminal Behavior in School and the Educational Rights of Adjudicated Youths

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The major question for this paper was how to protect students in our elementary and secondary schools with constitutional due process where attendance is compulsory and at the same time maintain a safe school environment? The paper present changes in juvenile justice and the impact of these changes on children. The paper also concludes that changes in juvenile justice results in a form of social control of non-hegemonic groups, minorities by a dominant hegemonic group, a collection of white European ethnic groups. Non-hegemonic or marginalized groups are those that cannot protect themselves through the political process, singularly or in combination with other groups. It is also argued that the best avenue for moving children of color away from the justice system for criminal behavior is for schools to teach information about the Constitution through the justice system. Young people, including children of color, will obey the laws if they have a better understanding of the laws and their relationship to the Constitution, the courts and the political process. The "crime control" laws enacted in the last two decades have had a negative impact on children of color engaged in delinquent behavior.

Conservative members of states and federal governments are using a call for improved "crime control" measures as a mechanism to control members of marginalized groups (including recent immigrants) to fashion strict criminal codes to control and restrict the constitutional rights politically marginalized groups (McNeil, 2002:5). In the United States, from the 1960s to the present has increasingly used crime control measures to restrict the fundamental rights of citizens with the major negative results falling on members of non-hegemonic groups; and in America the non-hegemonic groups are African Americans, Hispanics, Native Americans and Asian Americans. This paper examines the impact of these crime control measures designed to exercise increased social control over the poor, mainly people of color and specifically, restrictions of the constitutional rights of minority children enrolled in our public elementary and secondary schools. This research is restricted to public schools because the Bill of Rights in our Federal Constitution applies to state action as required by the 14th Amendment to the Constitution and not to the private actions of non public schools. Further, most children of color are enrolled in our public schools.

In 1994 Congress replaced the 1988 Omnibus Crime Control and Safe Streets Act, which became know as the Violent Crime Control and Law Enforcement Act of 1994. The 1994 Act also became know as the "Three Strike" Crime Bill that also directed the U.S. Sentencing Commission to make mandatory prison sentencing for certain illegal drug use and sale. For example, crack cocaine sale would carry a 5 year sentence for a first offense but the same violation with the sale of power cocaine would carry a one year sentence; and the amounts of each drug would be different: 5 grams of crack cocaine would demand the same sentence as 500 grams of power cocaine, a 100 to 1 ratio. At the end of 1995, African Americans constituted 85 percent of all person convicted of drug use or sale under this law (Brown, 2000). The 1994 Crime Bill also made it possible to prosecute children as young as 13 years old as adults.

The federal government and 26 states have three-strikes laws. But California is the only state that does not require that the third strike to be a violent crime. In California a non-violent crime of residential burglary may qualify as a first or second strike (Skipitares, 2002A: 1-3). In the seven years since passage of California's Three Strike Law, non violent residential burglary is the second most common third strike accounting for 11 percent of all cases with robbery being the most common. In 2002, nearly half of the state's 7,206 three strikers are doing 25 years to life for non-violent third strikes, including drug possession and petty theft. For example, Jed Miller in 1995 was sentenced to the maximum for stealing two bicycles and a truck; and another person drew a 25 years to life sentence for shoplifting two bottles of cognac from a Safeway store (Skipitares, 2002B: 1-3). African Americans make up 7 percent of California's population and 31 percent of the overall prison population and 44 percent of the three strikers in prison (Skipitares, 2002C: 1-3). Even in Santa Clara County south of San Francisco where African Americans comprise only 4 percent of the population they comprise 32 percent of the third strikers. Some claim that robbery; the most frequent crime for which three strikes defendants are jailed is disproportionately aimed at African Americans; and the statute is picking on African Americans as a group.

The California "three strike" law has been challenged in court and has reached the U.S. Supreme Court (Lane, 2002:A2). April 2002, the Court agreed to hear a case on appeal

from the 9th Circuit ruling on California's statute concluded that the Constitution "does not permit the application of a law which results in a sentence grossly disproportionate to the crime (Lane, 2002:A2). Approximately 57 percent of the 7,000 individuals serving sentences under the California law were convicted on nonviolent third felonies, including 644 convicted of drug possession and 340 convicted on charges of theft (Lane, 2002:A2). The cases involve *Lockyer v. Andrade* (No. 01-1127) and *Ewing v. California* (No. 01-6978). Oral arguments are expected in the fall of 2002 and decision due before July 2003. In one case, the person drew a life sentence under the statute for petty theft to support a drug habit.

Also connected to the new Crime Bill of 1994 was the passage by Congress The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 the removed from direct supervision of poor children by their mothers or primary care keepers who were forced to leave home to fine low paying jobs. Thus, many children went without supervision and their parents could not reward them with most necessaries with the pay from these jobs, which motivated many children to commit crimes mainly against property (theft). For example, since 1994 when the State of Georgia enacted strong juvenile crime laws, 75 percent of children arrested were African Americans and 90 percent of those convicted were African American; and most of juveniles arrested and convicted were Black boys who are viewed as super predators (Brown, 2002:107).

We address the following major issues regarding the law and children 18 years and younger enrolled in public schools who are defined here as juveniles. We also address other issues designed to help the reader gain a better understanding of the new limits and conditions for children of color living in America: the changing demographic of the school age population; the changing interpretation of the constitutional rights of students by the U.S. Congress and state legislative bodies, federal and state courts; the changing definition of juvenile crimes and implications of these changes for students brought juveniles before adult courts for violation of federal and state laws. However, the legal process has never been devoid of values, preferences, or policy positions. Ultimately, the legal process has always acted as an expression of social control. This control includes juvenile behavior.

Laws affecting juveniles, however, cannot be confined to students' lives while enrolled in school but their consequences for life long implications. The federal government and many states have enacted "three strike" laws requiring a minimum sentence for a person convicted of a third felony and in California the third strike does not have to be a violent crime. Juvenile crimes that were traditional brought before a juvenile court where the records were closed to the public are now available to be counted as a "third strike" later in life. This transfer of student delinquents from juvenile courts to adult courts have other implications: and are 13 and 14 year olds mature enough to defend themselves in an adult court; do they have enough knowledge to defend their rights under the Constitution. The transfer of juveniles to adult courts differs from state to state as to the age in which a student may be transferred and who carries the burden of proof in deciding such a transfer. Even the language differs from state to state: some refer to such a transfer as a "waiver" of juvenile rights, "bindover" from juvenile court to adult court or a "trigger" delinquent behavior requiring a transfer from a juvenile court to an adult. We will provide sample cases to illustrate our position but an exhaustive review of all court cases on this subject is beyond this review.

All elementary and secondary students are not considered alike under the laws of the federal government and state governments. Special education students, at least theoretically are treated differently if they have an emotional disability. Children from ages three to 21 with a disability must be provided with special education services according to the federal law, the Individuals with Disabilities Education Act (IDEA) requires that special education students must be provided with an Individual Education Plan (IEP) (20 U.S.C. δ 1412(a)(1)(B)(i)(ii) and may not be expelled from school due to violent behavior if that behavior is caused by his/her disability. The U.S. Supreme Court in *Honig v. Doe* (1988) ruled that such behavior must not be a manifestation of the student's disability. Schools may suspend such a student for 10 days for a cooling off period, only, unless they have evidence that the student may do harm to himself/herself, another student or teacher (See *East Islip Union Free School District v. Anderson, 1994*; *School Board of Pinellas County v. J.M. by L.M., 1997*). However, IDEA will not prohibit school officers from reporting criminal behavior by a special education student

to law enforcement authorities or supply a special education student's disciplinary records to law enforcement authorities (20 U.S.C. δ 1415(k)(9). School authorities have the right to transfer a student with a disability to an interim alternative setting for up to 45 days for the possession of a weapon or illegal drugs on school grounds or at a school function (20 U.S.C. δ 1415(k)(1)(A) under the Gun-Free Schools Act and the Drug-Free Schools Act.

These laws extend beyond schools to housing for the poor. This law affects the poor only, because middle-income families do not qualify for federally funded public housing. The Federal "Zero-Tolerance" laws of 1994 and 1996 involving weapons and illegal drugs on school grounds also included weapons and drugs possession in any federally funded housing (Stevenson, 2002:C1, C8). The law states that anyone entering a public housing unit who is connected to illegal drugs will cause the tenant to be evicted even if the tenant even if the tenant did not know the visitor was involved with illegal drugs. The U.S. Supreme Court upheld this part of the law as just but some lower courts are not abiding by the strict legal guidelines supported by the Supreme Court (Stevenson, 2002). For example, a public housing resident who likes to braid hair to make extra income, had a potential client to inquire about getting his hair braided and made an appointment but was arrested for drug use before he could keep his appointment. The Public Housing Authority in Durham, North Carolina sought an eviction of the tenant because that person was observed by an under cover agent visiting her home. However, a North Carolina Appellate Court ruled in favor of the tenant and her three small children. But, the importance of this case should not be lost on minority children who are convicted of using or selling illegal drugs, or being in the presence of those who traffic in drugs. If so, their parents may be evicted and if they become involved with drugs and are convicted, they cannot return home after serving time in prison for that offense. This case involved a disabled mother with three small children but others are not likely to be as fortunately. If for any reason the children of this mother become involved in drugs and wish to attend college, they will not be able to qualify for government guaranteed student loans. Again, it is unlikely that the wealthy will not find themselves in this position because mainly children from poor and lower middle income families will need and can qualify for such loans.

In addition to changing the rules of the game for juvenile justice, states are now requiring schools to share juvenile delinquent behavior with law enforcement agencies and social service agencies. In 2000, ten states increased requirements by school personnel and school boards to improve school safety but several went further to foster greater cooperation between schools, the police and the courts (Dagley, 2001:305-309). Colorado authorized information sharing between schools and other service agencies and law enforcement. Information to be shared included incidents that rise to the level of public safety such as truancy and disciplinary records maintained by school authorities. In Florida schools must provide access to the school district's database on students' records. Iowa authorized peace officers to make reasonable efforts to notify parents of students who violate school rules; and share these data with juvenile courts and social service agencies. Maine, Minnesota, and Missouri permit the disclosure of school records of pre-adjudicated juveniles to their criminal justice systems. New York requires their juvenile courts to provide notice to schools of enrolled juveniles sentenced for crimes. Virginia requires law enforcement officers to inform schools of drug law violations. Washington requires education records to be provided upon request by social service agencies and the courts; and set a minimum sentence for the allowable number of days of suspension for the consumption of controlled substances and alcohol on school grounds.

In a technology-based society, the sharing of information has important life implications for young delinquents. In the past, young delinquents who appeared before a juvenile justice system were accorded a certain degree of privacy; there records were closed to all public agencies. But if juvenile delinquent records must be shared with law enforcement agencies and later in life when they seek employment where criminal background checks are required, finding employment may be difficult or impossible. Research tells us that African American males who cannot find employment and have little chances of finding legal employment cannot find a female who will marry them, even when they father children with their female companions (Stack, 1974); and it appears logically that this situation holds true for other minority males. This situation will increase the number of single parent head of household and increased poverty for children of color.

Minority Population Changes

The minority student population in America increased from 10.4 million in 1985-86 to 13.7 million in 1994095 which constitutes 34 % of k-12 school enrollment in 1994-95 from 29% in 1985-86 (Garcia, 2001:25). A majority of the high school graduates in California, Hawaii, Mississippi, New Mexico, and the District of Columbia. By 2006, about 50% percent of all K-12 students will be minority students (Garcia, 2001:25). Changes in the size and composition of the K-12 student population should have enormous consequences for schools, including the languages and experiences they bring to school will influence the curriculum and how schools functions. In 2000, 64 % of the children were white, non-Hispanic, compared to 79% in 1972: 15% are Black, 4% are Asian, 1% Native American, and 16% are Hispanic (Imig, 2002:17). The percentage of school age students speak a language other than English or have difficulty speaking English has doubled over the past two decades, increasing from 2.8% to 5.0% in 1999(Imig, 2002:17). According to Harold Hodgkinson (1999:13) two factors serve to increase minority enrollments in our schools: immigration and fertility. Nearly 85% of immigrants come to this country from non-European countries; and the average Black female gives birth to 2.6 children compared to 1.7 children for the white population which is not enough to replace the white population (Hodgkinson, 1999:13). By 2020, half of the students will be non-white; and by 2050 or sooner half of all Americans will be non-white. The white school age population will continue to decline and the minority school age population will continue to increase (Hodgkinson, 1999:13). Today, more than 180 different language groups are represented in LEP programs funded under Title VII (Garcia, 2001:65). Many of these students also qualify for support under Title I programs for at-risk students. Also, many minority students are immigrants and need special services.

There is a concentration of minority children in one race urban schools where resources are limited and "crime control" is a major safety and political issue. This concentration makes it easier to target minority children for criminal behavior. The recent decision by the U.S. Supreme Court ending their 1954 decision in *Brown v. Board of Education* to

racially integrate the public schools will likely increase the ability of local governments to target minority students for greater social control with crime and safety issues. Beginning in 1960 whites left the inner cities for suburbia in large numbers to escape school integration (Flemming, 1975:55-60); and for whites who remained in the cities, intra-district segregation became the norm with ability grouping or tracking and the placement of minority students in special education classes (Flemming, 1975:60-62). The concentration of minority children in single race schools will make it easier to target this population for further regulation through crime control mechanisms supported by legislative bodies and the courts.

Juvenile Crime and Minority Life in America

In 1974 when Congress enacted the Juvenile Justice and Delinquency Prevention Act, which authorizes the establishment of the Office of Juvenile Justice and Delinquency Prevention to oversee community-based juvenile treatment, programs to deal with status offenders. The juvenile justice system is the step child part of the total justice system from its beginning (Reader, 1996:479).

Juvenile crime is not new in American but the rationale for changing the way we treat juvenile delinquents is new. In 1970, Ramsey Clark (1970: 35) former U.S. Attorney General under President Lyndon B. Johnson addressed the causes of crime in America concluded that in 1968: most individuals arrested for serious crimes were African Americans and the most serious risk is that racism may cause many white Americans to misunderstand the meaning of crime among poor Blacks because crime flows directly from racism, poverty and injustice if you are poor and a minority.

In 1968 two thirds of all persons arrested for serious crimes were under 21 years of age but crime by minors is less violent than adult crimes (Clark, 1970:219-220). The law may leave you without any rights but it will not ignore you because its major goal is to protect the wealthy from the poor juvenile delinquents (Clark, 1970:227). Millions of poor people have been forced by the state to testify against themselves and those they know (Clark, 1970:293) despite the Fifth Amendment and the *Miranda Rule* approved by the U. S. Supreme Court which states that a person arrested must be made aware his/her

rights under the Fifth Amendment; and provided representation by an attorney paid for by the State if he/she can not afford one.

Some judges sentence long, some short (Clark, 1970; 204). There are examples of inequality in sentencing daily, often in different courtrooms and the same courtroom. Some judges regularly give juvenile offenders prison terms for first-offense car theft, while others turn them over to the custody of their parents. In March 2002, a state trail judge Boston became concerned when two offenders came before his court for drug related offenses, one white who was a repeated offender and one African American a first time offender; and presented to his court by the same prosecutor/district attorney. The prosecutor recommended a one-year jail sentence for a first time offender, the African American; and probation and no jail time for the white person with multiply drug offenses for the same drug type on the same day before the same judge. The judge was so concerned that he issued a public statement and asked for another review of the case for the African American offender.

If you are minority and poor the law may not honor your rights under the U.S. or State constitutions but it will not ignore you (Clark, 1970; 227). A powerless person accused of a crime is helpless against the power of the state via the police; and many powerless minority juveniles have been imprisoned by the state with the insistence that they testify against themselves and their friends. Further, accused minority juveniles could spend many weeks and months in jail waiting for a trial and miss time in school being educated. The sole purpose of law enforcement is to maintain control over juvenile behavior as viewed and defined by the hegemonic group; and the question remains, how can the powerless or marginalized groups gain power or in this case get fair treatment from society's behavioral control agencies?

Causes of Juvenile Crimes

Schools are in a position to help mediate the criminal behavior of students of color if teachers have the proper attitude (Johnson, 1996:682-684). But you cannot teach a child you do not love, respect, or understand. For most children, school occupies a student's

live for six or seven hours a day for 180 days a year of 13 years. Exposure to education has a strong impact on students' behavior.

Despite the influence of education on juvenile behavior in reducing school crime, it continues. Crime still exists on school grounds. Yet, schools continue to improve safety measures to reduce juvenile delinquency on school grounds in order to increase safety for students and teachers. Researchers cite several factors influencing juvenile delinquency: education, more school dropouts commit crimes than those who remain in school and graduate; gender, males exhibit more delinquent behavior than females; race and ethnicity, racial and ethnic minority youths exhibit more delinquent behavior than majority youths; drug, more juveniles who use drugs are confined to youth correctional institutions throughout the country (Johnson, 1996:752-767).

There is a strong correlation between a child's racial status and family income level and his/her school behavior. It is within the family as a social unit that children learn nurturing, morals, and basic social values. The social economic status of the family also strongly influences a child's behavior in school. A child of color from a poor family generally resides in an unsafe neighborhood, receives a poor education, has possible gang influence, and receives poor parenting. One can argue that the elimination of poverty would cure most juvenile delinquency but such an argument in a capitalist society seems contradictory. Poverty appears necessary to maintain a free market system based upon capitalism.

School Crime

Recent juvenile crime in public elementary and secondary schools reported by the U.S. Department of Education and the U.S. Department of Justice (Kaufman and Associates, 2001:vii-viii, 61-62,69, 132) cited the following figure:

- The percentage of students in grades 9 through 12 threatened or injured with a weapon on school property has not changed significantly in recent years, ranging from about 7 to 8 percent of students reported being threatened with a with a weapon.
- In 1999, 12 through 18-year-old students living in urban and suburban locales were equally vulnerable to serious violent crime at school. Away from school, however, urban students were more vulnerable to serious violent crime than were

suburban students and suburban students were more likely to experience serious violent victimization than were rural students. Yet, student vulnerability to theft at school and away from school in 1999 was similar in urban, suburban, and rural areas.

- Young students (ages 12 through 14) were more likely than older students (ages 15 to 18) to be victims of crime at school. However, older students were more likely than young students to be victimized away from school.
- Elementary schools were much less likely than either middle or high schools to report any type of crime in 1996-97. Elementary schools were much more likely to report vandalism (31 percent) than any other crime (19 percent or less).
- At the middle and high school levels, physical attacks or fights without a weapon were the most commonly reported crime in 1996-97 (9 and 8 per 1,000 students, respectively). Theft or larceny was more commonly at the high school than at the middle school level (6 versus 4 per 1,000 students).
- Over the 5-year period from 1995-1999, teachers were victims of approximately 1,708,000 crimes at school, including 1,073,000 thefts and 635,000 violent crimes (rape or sexual assault, robbery, and aggravated and simple assault. On average, this translates into 79 crimes per 1,000 teachers per year.
- During the 1995 through 1999 period, senior high school and middle school teachers were more likely to be victims of violent crimes (most were simple assaults) than elementary school teachers (38 and 54 respectively), versus 16 crimes per 1,000 teachers.
- Teachers were differentially victimized by violent crimes at school according to where they taught. Over the 5 year period from 1995 through 1999, urban teachers were more likely to be victims of violent crimes than suburban and rural teachers (39 versus 22 and 20, respectively, per 1,000 teachers.
- In the 1993-1994 there were students' physically attacks at school, 12 percent of all elementary and a student, and 4 percent threatened secondary school teachers with injury. This represented about 341,000 teachers were victims of threats of injury by students that year, and 119,000 teachers were victims of attacks by students.
- The percentage of public schools that reported violent crimes to the police was 56.7; and minority enrollment was about 46.7 for a school less than 5 percent minority; 57.7 percent with a minority of 5 to 19 percent; 58.1 percent of schools with a minority of 20 to 49 percent; and 68.3 percent of the schools reported a crime to the police with a minority enrollment of 50 percent or more. The number of crimes reported to the police for the respective minority enrollment categories were: 700, 800, 1,500, and 1,200. The social economic status of a school as measured by free or reduced lunch eligibility was not as significant for low income student enrollment that exceeded 35 percent: less than 20 percent, 54.4; 21 through 34 percent, 53.2; 35 through 49 percent, 59.4; 50 through 74 percent, 58.8; and over 75 percent of the students on free or reduced lunch program, 59.2 percent of the public schools reported a crime to the police.
- The percentage of public schools reporting one or more serious crimes to the police based upon the schools' minority enrollment by the respective categories: less than 5 percent, 5-19 percent, 20-49 percent, and over 50 percent were 1.8,

3.2, 3.6, and 4.0; and for less serious crimes reported for the same minority categories were 22.3,27.4,31.5 and 31.7 respectively.

- The percentage of public schools with a law enforcement office presence during a typical week by minority enrollment levels and by school locale: In city, urban fringe, town and rural school the percentage for the 1996-1997 school year were 13, 7, 5, and 1 respectively. In schools with minority enrollments of less than 5 percent, 5-19 percent, 20-49 percent, and over 50 percent the police presence was 1, 6, 7, and 13 percent of the schools for the respective minority enrollment categories.

SCHOOL CRIME AND THE COURTS

New York City was the first American city or state to open a juvenile detention facility in 1825 but in 1899, Illinois became the first state to adopt a uniform juvenile code, and established the country's first juvenile court (Reader, 1996:479). Until the 1950s most juveniles were confined to juvenile detention facilities for delinquent behavior; and the courts were given jurisdiction over those who committed adult crimes or exhibited non-criminal status type behavior. Status offenders include truants, runaways, children who cannot be controlled by their parents or guardians, and those considered incorrigible (Reader, 1996:19).

It is well established that school officials do not need a search warrant or even probable cause to search a student's belongings of contrabands such as illegal drugs or weapons such as guns and knives (*State v. Crystal B,* 2000). But, a recent case that came before the Kansas High Court (*In the Matter of L.A.,* 2001) is an excellent example of how most state courts deal with the rights of juvenile crimes on school property. This case involved a petition by a student to suppress evidence of illegal drugs found on his person. The juvenile contended that (1) the search by school officials constituted governmental action, which violated his Fourth Amendment rights, and (2) his admission after a **Miranda** warning to a law enforcement officer was not admissible because a prior unwarned statement tainted it. The Kansas High Court (*In the Matter of L.A.,* 2001) concluded that:

1. At the hearing on a motion to suppress evidence of illegal drugs found during a school search, the state bears the burden of proving to the trial court the lawfulness of the search and seizure. Great deference is given to the factual findings of the trial court.

2. The accommodation of the privacy interests of schoolchildren with the substantial interest of teachers and administrators in maintaining order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law.

3. The legality of a search of a student by a teacher or other school official depends on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a twofold inquiry: first, one must consider whether the action was justified at its inception, second, one must determine whether the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place.

4. Under ordinary circumstances, a search of a student by a teacher or other school official will be justified at its inception when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.

5. A search of a student will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.

6. The statutory function of a school security officer is to protect school district property and the students, teachers, and other employees on the premises of the school district. A school security officer is not employed by an entity whose primary responsibility is law enforcement. During an investigation of a violation of school policy, a school security officer is not required to give a student **Miranda** warnings (a right to remain silent and a right to counsel under the 5th Amendment to the U.S. Constitution).

7. The Sixth Amendment to the United States Constitution, as applied to the states through the Fourteenth, requires that defendants tried as adults who are accused of serious crimes be afforded the right to trial by jury, and the right is applicable to any offense where imprisonment for more than six months is authorized.

8. Under the Kansas Juvenile Justice Code, there is no federal or state constitutional right to a trial by jury. However, if the offense the juvenile is accused of would be a felony as if an adult committed it, the judge has the discretion to order a jury trial for the juvenile.

New Federal Standard of Review for Criminal Behavior

The Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104- 132, 110 Stat. 1214 ("AEDPA") altered the standard of review federal courts must apply when

reviewing applications for a writ of habeas corpus. The Act applies to all habeas corpus petitions filed after April 24, 1996. The Act, including the amended standard of review, 28 U.S.C. § 2254(d) imposes the following standard of review that a federal court must utilize when reviewing applications for a writ of habeas corpus (the right to appeal a conviction to a higher court of law). An application for a writ of habeas corpus on behalf of a person in custody due to the judgment of a state court shall not be granted with respect to any claim adjudicated in state court proceedings unless the adjudication: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.

Federal courts are bound by a state court's adjudication of a petitioner's claims unless the state court's decision was contrary to or involved an unreasonable application of established federal law (*Franklin v. Francis*, 1998; *Harris v. Stovall*, 2000). A federal court must presume the correctness of state court factual determinations (*Cremeans v. Chapleau*, 1995). Federal courts must give complete deference to state court findings unless they are clearly erroneous. In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court, a determination of a factual issue made by a State court shall be presumed to be correct.

In another case, where the defendant was a minor under the law at the time the criminal act was committed (*Key, 2001)*, the court concluded that a minor petitioner was informed of his *Miranda* rights and understood them even as a legal minor without the assistance of parents or guardians. While petitioner's parents or guardians were not present during his interrogation, there was no evidence that petitioner requested that they be present or requested an attorney. The court concluded without consideration that petitioner was sixteen years old at the time of his offense and his interrogation; and while he was not a legal adult, petitioner had completed the tenth grade and was of normal intelligence. Like this state court, most state courts will consider juveniles mature enough to be tried before an adult under adult rules without constituting a violation of their basic constitutional

rights for their decisions made in court as a minor without the assistance of parents or guardians.

Student Search and Seizure

In this section we will address the law and conditions surrounding the search and seizures of property from juveniles or young people in school. A minor is anyone 18 years old or younger and must be turned over to a juvenile court if a crime has been committed. In 1994, Alabama, like many other states changed its statutes on juvenile delinquency in two ways: a prosecutor may petition to have a child who is 14 years or older tried as an adult; or any one 16 years or older who commits a felony is automatically tried as an adult (Cross, 1998:25-30).

The federal government and the states have increased the number of adult criminals by either lowering the age for bring juveniles to adult courts and increasing the amount and kinds of behavior classified as criminal (Rosenberg, 1996). In general the courts, federal and states, use a balancing test that weighs a student's privacy interests against the government's interest in maintaining order, discipline and security in schools (Rosenberg, 1996:12-15). When applying the Fourth Amendment to public school officials, the U.S. Supreme Court has ruled that neither a search warrant nor probable cause is required for searches of students; but instead the standard for searches of students by school officials is a reasonableness test (*New Jersey v. T.L.O., 1985).* It seems logical to assume that evidence seized by school administrators from students by searches based upon a reasonable suspicion will be considered lawful by a court of law. Nor are students given full protection under the Eight Amendment against excessive punishment and a due process hearing before punishment may be administered (*Ingraham v. Wright,* 1977); and students do not have the right to a jury trail in juvenile court proceedings.

The U.S. Supreme Court has concluded that under the Fourth Amendment to the U.S. Constitution, searches of students by school officials do not have to adhere to the standard of "probable cause" imposed upon law enforcement officers off school property but upon the "reasonableness" of the search in light of all the circumstances. There must

be reasonable grounds to believe that the search will reveal a violation of school rules or produce evidence of unlawful activity. The states remain free to provide greater protection for students, as Louisiana and California have done. In *New Jersey v. T.L.O.*, (1985) the U.S. Supreme Court responding to the search of a student's purse by the school's assistant principal that yielded marijuana and the school turned the matter over to the police. A juvenile court hearing was held and the girl was adjudged a delinquent. This judgment was appealed. Contending that her constitutional rights had been violated by the search of her purse, she contended that the evidence should have been excluded from the juvenile court proceeding. Her appeal was upheld by the New Jersey Supreme Court but the U.S. Supreme Court took the case and ruled that the search did not violate the Fourth Amendment prohibition against unreasonable search and seizure if: the search was justified by a reasonable suspicion and the scope and conduct of the search was reasonably related to the circumstances which gave rise to the search, and school officials took into account the student's age, sex and the nature of the offense. The Court also upheld the right of school officials to require students who participate in extracurricular activities to submit to drug testing (*Vernonia School District v. Acton,* 515 U.S. 646 (1995).

Police Involvement

Several state courts have taken the position that when police are involved in a student search, the Fourth Amendment standard of probable cause must exist and the students must be advised of their rights. A middle grade student brought a gun to school to protect him from bullies who had harassed him (*In the Matter of V.P.*, 2001). School officials and a school police were advised of the gun and escorted him an office for questioning where he admitted to having a weapon. The officer left the room during the questioning and the student asked to speak to his mother and lawyer. A Texas district court placed

the student in a treatment facility for 14 months. The student appealed the decision to the Texas Court of Appeals arguing that his confession and the seized gun evidence should have been suppressed because he had not received his *Miranda* warnings. The Texas Appeals Court denied his appeal. The Texas Appeals Court's decision in this case is similar to rulings from state courts in Rhode Island, New Jersey, Massachusetts, Florida and California that school officials are not required to meet the strict requirements of probable cause and need not issue *Miranda* warnings when questioning students about school rules violations (*In the Matter of V.P.*, 2001).

However, a Minnesota Court of Appeals held that the questioning of a middle grade student in the principal's office with the participation of a police officer was a custodial interrogation requiring the reading of the student's criminal rights (*In the Matter of the Welfare of G.S.P.*, 2000). The presence of the police officer made the *Miranda* warning necessary and as a result, the student's admissions could not be used in juvenile court proceedings. The warnings are required when a law enforcement officer initiates questioning after a person has been taken into custody or has been deprived of freedom in any significant way, his Fifth Amendment Rights must be upheld (*In the Matter of the Welfare of G.S.P.*, 2000). The student was told that he had no choice but to answer the question. But in general, students have a lesser expectation of privacy than that enjoyed by the general population, as their movements are controlled by teachers and administrators from the moment they arrive at school (*Milligan v. City of Slidell,* 2000).

A court case in Alaska gives another view of juvenile justice given the state's definition of who carries the burden of proof in transferring a minor from the juvenile justice system to adult courts. In 1994, Alaska amended its juvenile justice provisions to include an automatic waiver law from their juvenile justice court to an adult court (May, 1998). The automatic waiver law removes from the protection of the Alaska's Juvenile Justice for children, without a judicial hearing, sixteen or seventeen year-olds who are charged with (1) a class A felony and a felony crime against a person; or (2) first degree arson. The removal of a minor from juvenile supervision causes the minor to be charged, prosecuted and sentenced in an adult court. The statute also provides that if a minor is convicted of an offense that would not originally triggered the waiver provision, the

minor must prove, by a preponderance of the evidence, that he/she is amenable to rehabilitative treatment: the seriousness of the offense, the minor's history of delinquency, the probable cause of the delinquent behavior, and facilities available for treatment. But, the state must show that the minor cannot be rehabilitated by the age of twenty.

The ultimate result of the Alaska automatic waiver law and the burden-shifting provision is to entrust to the prosecutor substantial authority to determine a juvenile's proper jurisdiction (May, 1998). This determination continues to be influential even when judicial processes have determined that the evidence does not support it. The charges continue to influence disposition of the minor's case even where the minor is acquitted of the triggering charges. Critically, the state interest in automatic waiver cases also lies in the total discretion of the prosecutor to decide in which forum the minor will be adjudicated, eradicating the need for a judicial waiver hearing. The initial charging decision combined with a grand jury indictment determines whether the juvenile will be tried in adult court.

The lack of a meaningful judicial determination before transferring a minor to an adult court has caused some states to reject similar waiver or transfer provisions as unconstitutional. The Supreme Court of Delaware rejected the constitutionality of their state statute that provided for automatic transfer children who had committed crimes as minors but who had reached the age of eighteen prior to adjudication (May, 1998:142-144). The State High Court found the statute arbitrary and bearing no rational relationship to a legitimate government interest, because the prosecutor could exercise complete discretion in delaying a trial until the minor's eighteenth birthday. The Court determined that the lack of judicial review in the waiver process resulted in uncontrollable authority of the state to impose potential arbitrary charging decisions. Pursuant to the waiver statute, decisions are not made in public with reviewable judicial determination taking into account a child's individual circumstances, but behind the closed door of the prosecutor's office (May, 1998:145).

If a juvenile is originally charged with an offense that would not trigger the waiver provision, the minor is presumed to be amenable to treatment under the Alaska's Delinquency Rules for Juveniles for the same lesser crime, the state bears the burden to have the juvenile placed in an adult court. However, California, in a similar situation shifts the burden of proof to the juvenile. The presumption against the juvenile merely serves to make it more difficult for the minor to return a juvenile court, and reduces the state's responsibility at the waiver hearing. The minor can be returned to the juvenile system for sentencing if he or she is not convicted of the serious felony but is instead convicted of a charge that would not have triggered the waiver provision. However, to regain the benefits of juvenile treatment, the minor must demonstrate at a judicial hearing that he or she is amenable to treatment in juvenile rehabilitation programs. The burden then shifts to the minor to justify a return to the juvenile justice system; and for a child of color this burden could prove difficult.

The U.S. Supreme Court in *Kent v. United States* (1996) noted that the juvenile justice system was not providing young offenders with the same protection accorded adults nor the proper care designed for children. In *Gault* (1967), the Court held that juveniles were entitled to the same procedural due process protections accord adults such as the right to counsel; the right to notice of specific charges; the right to confront and cross examine witnesses; the right to remain silent; and the right to subpoena witnesses in defense. The Court expanded these protections further in *Winship* (1970) by requiring that quilt must be proven beyond a reasonable doubt in juvenile proceedings. But the Court in *McKeiver v. Pennsylvania* (1971) refused to extend the right to a trail by jury to juvenile proceedings; and later Court placed more restrictions on the constitutional rights of students on school property. The Court in *Ingraham* (1977) held that excessive corporal punishment of students did not violate their Eighth Amendment rights and their procedural due process rights did not require a pre-punishment hearing. The Court in *New Jersey v. T.L.O.* (1985) and *Vernonia School District v. Acton* reduced the constitutional protection of students against unreasonable searches and seizes.

In general, school police officers or school liaison officers have the right to search students without providing them with the constitutional rights afforded adults, even if a school police officer had directs, participated, or acquiesces in the search, only reasonable suspicion, rather than probable cause, is required to justify the search, since the school police officer is a school official employed by a district School Board (Bough, 2000). The courts feel that once a school official has reasonable suspicion that a student is carrying a weapon he or she may perform the search without concerns about the student's Fourth Amendment rights. The courts distinguished searches for weapons as opposed to drugs because a school official or police officer needs only reasonable suspicion to conduct such a search.

Can a minor perform a quality defense of his rights in an adult court? The following case will highlight some of the difficulties of such a case. Jamie Key (*Jamie Key v. U.S., 2002)* was found guilty of possessing narcotics with intent to distribute while legally a minor but was tried as an adult and convicted. He was assigned a court appointed attorney as his defense counsel in whom he claimed that he was not adequately represented at trail by counsel. Key was incarcerated at the time under a multi year sentence. He petitioned the court to vacate, set aside, or correct his sentence of 20 years under 28 U.S.C. § 2255 ("§ 2255 petition"). His petition was denied.

At trial, a jury found Key guilty of ten counts of possessing heroin with intent to distribute in violation of 21 U.S.C. § 841. Key was a minor at the time of his arrest, but he was tried as an adult and received a 20-year sentence. On appeal, the Seventh Circuit affirmed his conviction and sentence (*U.S. v. Jarrett, 1998)*. Key asserted that his counsel incorrectly advised him that he could only be sentenced based upon the amount of heroin reflected in the indictment in which he was specifically named and he was a juvenile when the crimes were committed. According to Key, his counsel stated that his offense level according federal sentencing guidelines would have to serve about seven years in prison if found guilty. But, his counsel did not advise him that under U.S.S.G. § 1B1.3(a)(1)(B) he would be liable for the entire amount of heroin sold during the course of the conspiracy, with a mandated 20 years in prison if found guilty. Key claimed that if he knew this information he would not have risked a jury trial, but would have entered

into a plea bargain to the stipulated amount of heroin; and sought a 3 point reduction for acceptance of responsibility under U.S.S.G. 3E1.1(a) & (b). His counsel was ineffective because he incorrectly advised him about his sentence. But to establish that counsel provided ineffective assistance, the Key had to demonstrate: (1) that his attorney's performance was deficient; and (2) that such representation prejudiced his case. The first prong is satisfied by a showing that counsel's performance fell below the "objective standard of reasonableness" guaranteed under the Sixth Amendment. To satisfy the second prong, the he must show that because of counsel's errors, the outcome of his trial or sentencing was unfair. Because counsel is presumed to have been effective by the court, the Key bore a heavy burden in proving that counsel was ineffective. The court held that attorneys have a duty to inform their clients of a plea agreement offered by the prosecution but Key did not seek a plea, therefore non-existed. At the same time, Key asserted that his attorney never advised him of the value of a plea which would have gotten him as little as 78 months or 6.5 years of prison time instead of 240 months or 20 years in confinement. Key did not meet the court's definition of ineffective counsel, which reveals how difficult it is for anyone to correct a mistake or challenge the behavior at trail of an incompetent court appointed counsel. This lack of expert advice by Key's counsel added an additional 11 years in prison for a person who committed a non-violent crime as a minor. As Ramsey Clark observed in 1970, the law may not accord a poor youth his/her constitutional rights, but the law will not ignore you either. A major function of law enforcement is to preserve social order in a capitalist society by controlling the behavior of those in society lacking the basic needs of life. The groups that fit into this category in the United States are racial and ethnic minority families and their children.

Conclusions and Solutions

The major question was how to protect children of color enrolled in K-12 schools where attendance is compulsory and at the same time maintains a safe school environment? We argue that the best avenue is to teach information about the justice system as it relates to the Constitution. More knowledge about the Constitution and justice should motivate

more children to obey the law and improve their chances of becoming productive citizens.

We find that the criminal statutes in this country are unfairly designed to control the delinquent behavior of juveniles from minority groups compared to the juveniles from the controlling hegemonic majority group. The children from minority group backgrounds are more likely to experience needs deprivation (poverty) and seek illegal means to meet those needs. Second, minority youths are monitored more closely by law enforcement agencies than majority youths. Third, certain legal statutes are harsher on the illegal behavior more common to minority youths than for offenses more common among majority youths. For example, power cocaine typically used by majority youths carries less of a penalty than crack cocaine typically used by the poor and minority youths. Fourth, prosecutors, judges and juries are more related and understanding of the cultures and backgrounds of majority youths than minority youths. Finally, the easiest way to reduce this unequal treatment between poor minority children in school and majority children in general would be to eliminate poverty which produces a greater need to get involved in delinquent behavior. The elimination of poverty or for members of minority groups to gain parity with the dominant hegemonic group seems impossible in a capitalist society. We assume that these punitive legal conditions will continue to exist for minority children. We do not believe that a call for an change in present anti crime legislation at the federal and state levels will yield meaningful result in the immediate future. Therefore, we will focus on advising schools that serve large populations of minority children to take measures to educate their students, parents and communities about laws aimed at controlling the behaviors of minors in minority communities.

We recommend that schools find ways to integrate lessons about the criminal justice system into the curriculum. In predominately minority schools, it is more important to teach about the criminal justice system than to teach curricula units on drug abuse, sex or any of the other related topics because all of these topics interact in meaningful ways with the criminal justice system. A curriculum unit on the criminal justice system may be included with a unit on the Constitution in order to give the Constitution greater meaning for the daily lives of students. Students will soon learn that the 4th, 5th and 8th

Amendments to the U.S. Constitution have different means for police officers, juvenile courts and adults in placing meanings on these Amendments. We believe that once students and parents understand the criminal statutes and justice system they will be in a better position to make discriminating decisions about their behavior and if illegal behavior follows they will be in a better position to defend them. Minority students and their parents can better gage the impact of these on the future well being of their children. For example, parents will now know that delinquent behaviors they were involved in during their school days, similar behaviors today will get their children expelled, placed in a juvenile detention center or in jail; if a felony is committed, the student may draw a life sentence later in life for a repeated offense under federal and state "three strike" laws; if they wish to attend college and were involved drugs, they will not be able to qualified for a federal student loan; and will not be able to find employment with a government agency if they were ever convicted of a felony or drug use, where criminal background checks are required; their parents cannot live any federally funded public housing; and they may not be able to vote in state and federal elections which is a necessary step to improving one's condition in this country. Schools may qualify for special funding from the Federal Government's Program for Sate Schools but we believe improve knowledge about the criminal justice at the earliest age is the best possible way to influence behavior of children in school, which is the focus of this review.

We recommend that if given a choice, delinquent school children should be first treated at school and secondly treated through the juvenile justice system instead of the adult courts. For school districts we recommend the placement of delinquents in alternative schools designed to return these students back to regular schools as soon as possible; and for special education children we recommend that schools seek to correct their behavior through IEPs. Most special education students are from minority groups and predominately male, the largest group incarcerated by the crime justice system; and the federal laws should work to reduce the number of minority males entering alternative education centers within local school systems and the juvenile justice system.

Students who have been expelled should be given home instruction, which is required for special education students, but should be available to all expelled students. A critical

component of the curriculum for expelled students should include a unit on the criminal justice system and the Constitution, which may be included in a civics course for middle grade students and a history course for high school students.

A minor has an interest in being sentenced as a juvenile. Adult sentencing is significantly different than juvenile sentencing (May 1998). As a juvenile, a minor is entitled to privacy, treatment, and leniency. Juveniles convicted as adults face harsher penalties and a permanent criminal record. Minors have little likelihood of rehabilitation when incarcerated with adult felons in prisons that lack suitable treatment programs. What treatments are recommended for juvenile delinquents who are expelled from school, placed in an alternative school, tried in a juvenile justice system or in an adult justice system?

Alternative schools are used for students who cannot be adequately educated in regular schools because of delinquency behavior. Alternative schools prevent violence by: first, these schools prevent violence in schools because these prevent offenders from roaming the streets; second, alternative programs focus on the education of troubled students; and third, these schools provide juveniles with an education to decrease future criminal behavior. Alternative schools attempt to teach self-control, encourage a sense of community and provide proper counseling for this population of students (Beresh-Taylor, 2000:140-145). Each school district should implement crisis prevention and response teams, mediation and conflict resolution programs; and violence prevention should be comprehensive. Further, because potentially violent students come from diverse backgrounds, schools must not target a particular group of students for treatment for violence behavior (Beresh-Taylor, 2000:184-185). States should mandate that all suspended and expelled students be provided with education in an alternative school or with home instruction. The Gun-Free Schools Act of 1994 (20 U.S.C. δ 8921(b)(2) states that: Nothing in this subchapter shall be construed to prevent a State from allowing a local educational agency that has expelled a student from such a student's regular school setting from providing educational services to such student in an alternative setting.

The use of the justice system in America to control the behavior of children of color in a capitalist system is not likely change to benefit the children of color in the future; therefore, we make our recommendation based upon this assumption. The evidence is clear that these socially regressive criminal statutes more negatively affect the people of color than any other group in America, even for poor whites. Poor whites are members of the hegemonic group and therefore, their communities are not targeted in the same regressive manner as minority communities and receive protection from the criminal justice system that most poor minority children do not receive. This is true in school and outside of school in the community.

Finally, we recommend that schools institutionalize the dissemination and discussion of the law and citizenship in the U.S. States with a course or units in social studies courses at all grade levels. Even in kindergarten, it is important for a children living in public housing to understand the harm in being associated with anyone dealing or using drugs on themselves and their families. This is important even if they are not involved with drugs, their association may cause their family to be evicted as tenants in federally funded public housing. These classes should produce a broad base discussion of the criminal justice system and growing up in American; make it easier to secure films and speakers on the subject; and make for a more critical analysis of the U.S. Constitution under which the laws discussed in this paper are deemed constitutional. The Constitution as discussed in most social studies classes, seems more like a fairy tale than what most people of color experience under the Constitution in their daily lives. The use of the criminal justice system as a basis for studying the Constitution should be mandatory in every school system if we wish children to understand and honor those laws. Ignorance of the law, as we have seen in this paper is not allowed in courts for juveniles, so we owe to our children to inform them about life in the same manner we inform them about other harmful commodities and events in life-sex education, proper diets, physical conditioning, and harmful drugs. Jamie Key (2002) discovered too late that ignorance of the law, even as a minor increased his prison sentence by 12 years. We encourage school system and textbook companies to include extensive units on the criminal justice system as it relates to the Constitution. This suggestion goes hand in hand with this

recommendation because textbook writers has a tremendous impact on what gets taught in schools. We anticipate that if children discuss these topics in schools, they will more than likely carry on these discussions at home and in their communities; and a multiplier effect will take place where students of color and their families will gain more knowledge about the criminal justice system and its impact on their lives. Evidence strongly suggests that proper education for children of color about the criminal justice system in their respective states and the Federal Constitution is the most feasible option with the cost being supported with public funds in an institution where all most attend. Finally, there is also strong evidence that this country is willing to pay any cost to incarcerate children for criminal behaviors in the harshest way regardless of the cost or the reasons for criminal behavior, including poverty. Therefore, education becomes critically important in anti-delinquent behavior prevention.

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